MOTION FILED
SEP 29 1997

No. 97-369

In The

Supreme Court of the United States

October Term, 1996

COALITION FOR ECONOMIC EQUITY, ET AL.,

Petitioners,

v.

PETE WILSON, GOVERNOR OF THE STATE OF CALIFORNIA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

MOTION OF HUMAN RIGHTS ADVOCATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS

CONSTANCE DE LA VEGA
Counsel of Record
University of San Francisco
Law Clinic
2130 Fulton Street
San Francisco, CA 94117
(415) 422-6752
Attorney for Amicus Curiae
Human Rights Advocates

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MOTION OF HUMAN RIGHTS ADVOCATES TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE

Human Rights Advocates hereby respectfully moves this Court for leave to file a brief in the above-entitled case, pursuant to Rule 37 of the Rules of this Court. The applicant is a non-profit California corporation that provides education about the application of international human rights law in domestic and international fora. *Amicus Curiae* has requested the consent of the Petitioners' Counsel of Record and the State Attorney General who represents the defendant class. Consent of those parties to file such brief has been granted.[1]

Human Rights Advocates endeavors to advance the cause of human rights to ensure that the most basic protections are afforded to everyone. Subsequently, Human Rights Advocates has duly submitted briefs as *amicus curiae* in cases involving individual and group rights where international standards offer assistance in interpreting both state and federal statutes at issue.[2]

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[1] *Amicus Curiae* is unclear how many other parties are involved in this matter. Letters from all parties consenting to the filing of this brief are being sent with this brief to the Clerk of this Court.

Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

[2] Examples of amicus briefs that Human Rights Advocates has filed include those in the following cases: *Cal. Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Greenham Women Against Cruise Missiles v. Reagan*, 755 F.2d 34 (2nd Cir. 1985); *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996).

Human Rights Advocates would like to take the opportunity to inform this Court of the applicable treaty standards that would help in interpreting the California law in question in this case, as well as the constitutional standards involved. *Amicus* is specifically concerned that the opinion of the Court below raises serious implications on the ability of state and local government to comply with those treaty standards. Additionally, *amicus* will address the issues raised by petitioners related to the meaning of the California Constitutional provision with respect to equal protection under the United States Constitution and civil rights statutes.

The parties have not addressed this very important aspect of the law.[3] For these reasons, Human Rights Advocates respectfully urges the Court to grant this motion to file the accompanying *amicus curiae* brief in support of the petitioners.

Respectfully submitted,

CONSTANCE DE LA VEGA
Counsel of Record
Amicus Curiae
Human Rights Advocates

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[3] Several *Amici Curiae* did file a brief with the District Court raising the issue generally. (Brief of *Amici Curiae* in Support of Plaintiffs' Amended Complaint and for Injunctive and Declaratory Relief.)

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BRIEF AMICUS CURIAE

SUMMARY OF THE ARGUMENT

Proposition 209 is a state initiative amending Article 1 of the California Constitution to prohibit all affirmative action programs based on race or gender. This case raises the issue of whether Proposition 209, as interpreted by the Court of Appeals for the Ninth Circuit in *Coalition for Economic Equity ("CEE") v. Wilson*, 110 F.3d 1431 (9th Cir. 1997), conflicts with U.S. treaty obligations. Proposition 209 would act to repeal all existing state and local affirmative action programs, as well as prohibit all future adoption of affirmative action programs based on race or gender. The Court of Appeals' opinion reversed an order of the United States District Court for the Northern District of California, filed December 23, 1996, which granted plaintiffs' motion for a preliminary injunction. The Court of Appeals held that Proposition 209 did not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution, thereby permitting Proposition 209 to go into effect. *Amicus Curiae* Human Rights Advocates is concerned that the ruling creates a potential conflict between the state law and treaty obligations which are now part of the Law of the Land under the Supremacy Clause of the United States Constitution.

Human Rights Advocates would like to bring to the Court's attention the treaty standards applicable to this case under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), *opened for signature* March 7, 1966, 660 U.N.T.S. 195 (entered into force January 4, 1969; adopted by the United States November 20, 1994), and the International Covenant on

Civil and Political Rights (ICCPR), *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976; adopted by the United States September 8, 1992). In turn, Human Rights Advocates urges this Court to interpret the laws in question so that they conform with obligations under those duly ratified treaties. Otherwise, if Proposition 209 is upheld, the effect could impair the ability of local and state governmental entities to institute measures designed to meet U.S. obligations under the treaties and the U.S. Constitution.

This brief, therefore, is submitted in support of the petition for writ of certiorari. It is urged that this Court consider the treaty obligations when construing the application of the constitutional standards as defined in *Hunter v. Erickson*, 393 U.S. 385 (1969); *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982); and *Romer v. Evans*, 116 S. Ct. 1620 (1996), as well as those under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, to this case. These issues are of importance throughout the Land, not just in California. Because of the serious implications of the opinion of the Court below on the ability of state and local governments to comply with the treaty standards, Human Rights Advocates respectfully requests that this Court grant the Petition for Writ of Certiorari.

ARGUMENT

I. Treaty Provisions are the Supreme Law of the Land Under the U.S. Constitution

Under the United States Constitution Article VI, clause 2 of section 2, "all treaties made or which shall be

made, under the authority of the United States shall be the Supreme Law of the Land, and the Judges in every State shall be bound thereby, anything in the Constitution or Law of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 2, cl. 2. When a treaty and state law conflict, the treaty controls. *See Zschernig v. Miller*, 389 U.S. 429, 440-41 (1968); *Clark v. Allen*, 331 U.S. 503, 508 (1947); *see also Missouri v. Holland*, 252 U.S. 416, 433-35 (1920) (concluding that the validity of a treaty was not undermined by a possible infringement on states' rights under the Tenth Amendment unless it violated an express prohibition of the Constitution). Also, courts should construe treaties "in a broad and liberal spirit, and when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred." *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924).

The United States ratified the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), which entered into force for the United States on November 20, 1994. 140 Cong. Rec. S 7634 (June 24, 1994). The United States has joined more than 146 states that have become parties to CERD and pledged to eradicate racial discrimination within their borders.[4] Previously, the United States had become a party to the International Covenant on Civil and Political Rights (ICCPR) on September 8, 1992. 138 Cong. Rec. S 4781-84

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[4] *See* Multilateral Treaties Deposited with the Secretary-General, ST/LEG/SER.E/14, at 95, Dec. 31, 1995.

(April 2, 1992). The United States is now one of 132 countries that is a party to that treaty.[5]

CERD and ICCPR, as ratified treaties, are the Supreme Law of the Land. The United States is now bound to protect the rights enumerated in those treaties. Both treaties establish a committee to monitor compliance with the provisions of the treaty. Under CERD, this body is called the Committee on the Elimination of Racial Discrimination. CERD, Articles 8-15. The enforcement body established by the ICCPR is the Human Rights Committee. ICCPR, Articles 28-45.

In 1995, the United States' delegation to the Human Rights Committee stated that "courts of the [United States] could refer to the Covenant and take guidance from it." Statement of Conrad Harper, Legal Advisor, U.S. Department of State, to the United Nations Human Rights Committee, U.N. GAOR, Hum. Rts. Com., 53rd Sess., 1405th mtg., U.N. Doc. HR/CT/404 (1995). Indeed, in order to ensure compliance with the treaty obligations, the courts of this country should seek guidance from the ICCPR in interpreting U.S. laws. Similarly, courts could seek the same interpretive guidance from CERD provisions. This Court should therefore consider these treaty

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[5] *See* Multilateral Treaties Deposited with the Secretary-General, ST/LEG/SER.E/14, at 121, Dec. 31, 1995 (As of November 1, 1996, the number of countries that have become party to ICCPR have increased to 136, according to a report submitted to the United Nations Commission on Human Rights by the Secretary-General, Status of the International Covenants on Human Rights, Report of the Secretary-General, U.N. Commission on Human Rights, 53rd Sess., U.N. Doc. E/CN.4/1997/72 (1996)).

provisions when interpreting U.S. laws. Failure to do so will undermine the U.S. credibility as a State Party to these, as well as other, treaties.

II. Proposition 209 Impairs the Ability of State and Local Governmental Entities to Institute Measures Designed to Meet U.S. Treaty Obligations Under CERD, ICCPR, and the U.S. Constitution

Both CERD and ICCPR elaborate on the basic principles of equality and nondiscrimination. CERD focuses specifically on discrimination and thus addresses a wide range of categories of rights in which discrimination is prohibited. CERD provides that State Parties to the treaty must attempt to prohibit and to eliminate racial discrimination and to guarantee the equal right to enjoyment of civil and political rights. CERD, Article 5. Furthermore, CERD contains very specific provisions mandating affirmative action programs to remedy discrimination and provides that such actions shall not be deemed discrimination. CERD, Article 2(1).

The critical definition of racial discrimination is set forth in Article 1(1) of CERD:

> [A]ny distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

CERD, however, also provides an exception for special measures that are "taken for the sole purpose of

securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights or fundamental freedoms . . . " Article 1(4). This is an exception designed for affirmative action programs and for other measures states may take to combat discrimination.

CERD outlines the fundamental obligations of State Parties to take steps to erase discrimination within their borders and obligates States Parties to "undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms . . . " CERD, Article 2(1). It also requires States Parties to ensure protections of rights within social, economic, cultural and other fields by taking "special and concrete measures . . . for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." CERD, Article 2.

The provisions in the ICCPR provide protection to much broader categories of persons and define the civil and political rights in greater detail. Part II establishes the general duties of State Parties under the ICCPR, which include the obligation to "take the necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized in the present Covenant." ICCPR, Article 2(2). Articles 2, 3 and 26 of the ICCPR set forth the basic principle of equal protection of the laws. Article 2(1) requires that States Parties provide the enumerated rights to all individuals within their jurisdiction without regard to "race, colour,

sex, language, religion, political or other opinion, national or social origin, property, birth or other status." Article 3 specifically guarantees "the equal right of men and women to the enjoyment of all civil and political rights set forth in the . . . Covenant." Article 26 reinforces the equal protection language in Article 2 by stating that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases.

It is clear that the purpose behind Proposition 209 was to eliminate affirmative action programs that benefit women and minorities. (*See* Petition for Writ of Certiorari page 4, footnote 2.) The Court below justified its holding that Proposition 209 did not violate the Equal Protection Clause by stating that all affirmative action programs are inherently discriminatory. *CEE v. Wilson*, 110 F.3d at 1445. This definition of affirmative action conflicts with the definition of "racial discrimination" in CERD, which provides that actions "taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection . . . in order to ensure . . . equal enjoyment or exercise of human rights or fundamental freedoms shall not be deemed racial discrimination." CERD, Article 1(4). Indeed, by eliminating programs that seek to address the lack of equality in certain areas, Proposition 209 may perpetuate racial discrimination in violation of CERD since it may have the "purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an ***equal footing***, of human rights and fundamental freedoms in the political,

economic, social, cultural or any other field of public life." CERD, Article 1(1).[6]

The Human Rights Committee has also considered whether distinctions are permissible under the ICCPR which requires that the rights under that treaty be provided without regard to "race, colour, sex, language, religion, birth or other status." ICCPR, Article 2(1). The Committee recognized that "not all differentiation of treatment constitutes discrimination if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant." U.N. GAOR, Hum. Rts. Comm., 37th Sess., 984th mtg., at 4, U.N. Doc. CCPR/C/21/Rev.1/Add.1 (1989).

This Court made clear in *Adarand Constructors Inc. v. Pena*, 515 U.S. 200 (1995), that a race-based preference program may be a constitutional means of remedying discrimination. Justice O'Connor in the majority opinion recognized that "[t]he unhappy persistence of both the practice and the lingering effects of racial discrimination against minority groups in this country is an unfortunate reality, and government is not disqualified from acting in response to it." *Id.* at 237. Thus, "[w]hen race-based action is necessary to further a compelling interest, such action is within constitutional constraints if it satisfies the

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[6] This is similar to the position of Justice Stevens, who was joined by Justice Ginsberg, in his dissent in *Adarand Contractors, Inc. v. Pena*, 515 U.S. 200, 243 (1995) (Stevens, J., dissenting), where he noted that there is a difference between racial classifications that are used for the purpose of discrimination and those that have the goal of remedying discrimination.

'narrow tailoring' test this Court has set out in previous cases." *Id.* Proposition 209's broad sweep will prohibit all affirmative action programs, even those government programs "narrowly tailored to further a compelling interest" of remedying past discrimination, in violation of the Constitution and the provisions of CERD and the ICCPR.

In this case, four Court of Appeals justices dissented on the denial of the rehearing *en banc*. *CEE v. Wilson*, 1997 WL 563160 (9th Cir. 1997), 97 Cal. Daily Op. Serv. 6966, 97 Daily Journal D.A.R. 11,270 (opinions dissenting from the denial of rehearing *en banc*). These four justices concurred that "Proposition 209, of course is not mere repeal of existing affirmative action programs . . . Proposition 209 does much more [. . .]: It forbids all institutions of representative government from enacting race – or – gender-based affirmative action programs – and only those programs – in the future." *CEE v. Wilson*, 1997 WL 563160 at 8. If this is true, the blanket prohibition of all affirmative action programs directly conflicts with the obligation of the United States as a party to CERD, under Article 2(2) to take "special and concrete measures . . . for the purpose of guaranteeing [racial groups or individuals belonging to them] the full and equal enjoyment of human rights and fundamental freedoms." It may also impinge on the the obligation in the ICCPR to take necessary steps . . . to adopt such legislative or other measures as may be necessary to give effect to the rights recognized" in that treaty. ICCPR, Article 2(2). Indeed, the Human Rights Committee in 1995, after considering a report from the United States on its progress on ensuring the enjoyment of rights under the ICCPR, made the specific recommendation that affirmative action should be

adopted in order to eliminate discriminatory attitudes and prejudice toward minority groups and women.[7] Under the ruling of the Court below, Proposition 209 impairs the ability of governmental entities in California to institute remedial measures designed to meet their treaty obligations to eradicate racial discrimination under the two treaties.

Finally, CERD mandates that the United States should take affirmative steps "to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race . . . to equality before the law, notably in the enjoyment of . . . (c) [p]olitical rights . . . to take part in the Government as well as in the conduct of ***public affairs at any level*** and to have ***equal access to public service***." CERD, Article 5(c). The Court of Appeals admits that "Proposition 209 ***burdens*** members of insular minorities within the majority that enacted it who otherwise would seek to obtain race-based and gender-based preferential treatment from local entities." *CEE v. Wilson*, 110 F.3d at 1442. In this way, Proposition 209 may also impair the ability of government entities to meet their obligation under Article 5 of CERD, since it places a burden on minority groups seeking to "take part in the conduct of public affairs." CERD, Article 5(c).

Thus, it is imperative that this Court consider treaty language in determining whether to grant the petition for

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[7] See Consideration of Reports: Comments of the Human Rights Committee, United States of America, U.N. GAOR, Hum. Rts. Comm. 53rd Sess., U.N. Doc. CCPR/C/79/Add. 50 (1995) at ¶ 30.

Writ of Certiorari because of the potential negative impact that the Court's ruling below can have on U.S. treaty obligations.

III. This Court Should Consider the Two Treaties When Addressing Petitioners' Reasons in Support of The Petition for Writ of Certiorari

The treaty obligations in CERD and ICCPR above are directly relevant to the reasons cited by petitioners in support of their petition for writ of certiorari and mandate that the ruling be reconsidered, particularly with respect to the issues of access to the political process, denial of opportunity to seek protection under the Equal Protection Clause, and the flexibility that state and local governments have to implement programs to remedy discrimination.

Article 5(c) of CERD, discussed above, is useful to the consideration of the issue of access to the political process. In *Hunter v. Erickson*, 393 U.S. 385 (1969), Justice Harlan wrote that "a provision that has the clear purpose of making it more difficult for racial . . . minorities to achieve legislation that is in their interest . . . is discriminatory on its face." *Id.* at 395. The Supreme Court later adopted Harlan's reasoning in *Washington v. Seattle School Dist. No. 1*, 458 U.S. 457 (1982), holding that a state may not "place special burdens on the ability of minority groups to achieve beneficial legislation . . . by lodging decisionmaking authority over the question at a new and remote level of government." *Id.* at 467. The Court should consider the CERD treaty provision which mandates State Parties to guarantee equal access to the political process

in resolving whether the decision below is consistent with the holdings of *Hunter* and *Seattle*.

The treaty obligations also are relevant to the issue of selective denial of opportunity to seek protection against discrimination in violation of the Equal Protection Clause. This Court recently held in *Romer v. Evans*, 116 S.Ct. 1620 (1996), that "[a] law declaring that in general it shall be more difficult for one group of citizens than for all others to seek aid from the government is itself a denial of protection of the laws in the most literal sense." *Id.* at 1628. Applying this principle, this Court invalidated Colorado's Amendment 2, an initiative that disabled "government and each of its parts" from remedying discrimination against gays and lesbians.

The basic principle of equal protection of the laws articulated in *Romer* is also set forth in the ICCPR. Notably, Article 26 states that all persons are equal before the law and are entitled to equal protection regardless of any of the specified bases. Article 3 specifically guarantees the "equal right of men and women to the enjoyment of all civil and political rights . . . " The Court should consider treaty standards in resolving whether the decision below is consistent with the holding of *Romer v. Evans*.

Finally, the treaty obligations above are relevant to the issue of whether states may enact laws that impede Title VII's national policy of encouraging state and local governments to voluntarily remedy past discrimination. This Court has recognized that in passing Title VII, Congress intended to encourage public and private employers to voluntarily enact race- and gender-based

affirmative action programs in order to accomplish the national goal of "break[ing] down old patterns of racial segregation and hierarchy." *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). In denying state and local entities the power to voluntarily redress past discrimination through race- and gender-conscious means, Proposition 209 not only impedes the furtherance of Title VII's congressionally mandated goal, but it will also impede the goal of eradicating racial and gender discrimination mandated by CERD and ICCPR. The Court should take those requirements into consideration in assessing the standards applied by the Court below.

The two treaties, therefore, support the petitioners' request for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

CONSTANCE DE LA VEGA
Counsel of Record
Amicus Curiae
Human Rights Advocates